DR. G. GOPALA KRISHNAN, RE

HIGH COURT MALAYA, KUANTAN
LAMIN MOHD YUNUS J
[BANKRUPTCY NO. 29-1-90]
8 JANUARY 1991

BANKRUPTCY: *Application to set aside bankruptcy notice not heard - Whether act of bankruptcy committed - Whether creditors petition a nullity - Judgment sum not settled within 7 days as required by bankruptcy notice - No application to extend the seven day period nor was it extended by SAR - Judgment debtors affidavit showed no quantification of cross claim.*

On 26 November 1987 the judgment creditor (JC) obtained final judgment against the judgment debtor (JD) in the sum of RM59,339.24. JD failed to satisfy the whole judgment sum. On 3 January 1990 JC filed a bankruptcy notice which was served on JD on 22 January 1990. On 26 January 1990 JD filed an affidavit under r. 95(1) of the Bankruptcy Rules 1969. On 28 May 1990 JC filed creditors petition which was served on JD on 26 June 1990. It was fixed for hearing on 3 September 1990. On 5 July 1990 JD filed a notice of intention to oppose the creditors petition.

The Counsel for JD argued that as the application to set aside the bankruptcy notice had never been heard, no act of bankruptcy had been committed and as such the creditors petition was nullity *ab initio* and must be set aside.

Held:

[1] The bankruptcy notice was served on JD on 22 January 1990. If by 29 January 1990 the JD did not settle his debt, he could have committed an act of bankruptcy on that date. Pursuant to r. 95(2) the application to set aside the bankruptcy notice must be heard within the time stipulated in that notice and in this case within 7 days after the service of the notice unless the seven-day period is extended. In this case the seven-day period was not extended therefore the 'deeming' provision as provided in the second limb of r. 95(2) does not apply. Whether a date for the application to be heard within the seven-day period had been fixed and that no hearing took place is immaterial. In the circumstances the validity of the creditors petition and the Bankruptcy notice was not affected. The JD committed an act of bankruptcy as there was no settlement of the judgment debt.

[2] The affidavit filed to set aside the bankruptcy notice is short and briefly makes only a general statement to the effect that the JD has a cross claim which can be quantified. There is not the slightest indication as regards the amount or even the probability of success of the cross claim and matter it equals or exceeds the sum claimed in the notice. Also, no triable issue can be detected from the affidavit from which to assess the probability of success in the cross claim. With such a brief affidavit containing only general statements one may even begin to suspect whether there is in fact a cross claim.

[JD's application dismissed with costs.]

Cases referred to:
Krishnamurty s/o Nagaratnam v Mayban Finance Bhd. [1990] 2 CLJ (Rep) 282 ***(dist)***
Sovereign General Insurance Sdn. Bhd. v. Koh Tian Bee [1988] 1 CLJ (Rep) 277 ***(foll)***

Legislation referred to:
Bankruptcy Rules 1969, r. 95(1), 95(2)

Other source referred to:
Halsbury's Laws of England 4th Edn., Vol. 3

JUDGMENT

Lamin Mohd. Yunus J:
The background to this case was that on 26 November 1987 the judgment creditor obtained final judgment against the judgment debtor in Kuantan Sessions Court civil suit *vide* summons Case No. 62-283 of 1987 in the sum of RM59,339.24. Having failed to satisfy the judgment creditors in respect of the whole judgment sum, the judgment creditors, on 3 January 1990, filed a bankruptcy notice (encl. 4) in this Court which was served on the judgment debtor on 22 January 1990. On 26 January 1990, the judgment debtor filed affidavit (encl. 6) under r. 95 (1) of the Bankruptcy Rules 1969. On 28 May 1990 the judgment creditors filed a creditors petition (encl. 8) which was served on the judgment debtor on 26 June 1990. It was fixed for hearing on 3 September 1990. On 5 July 1990 the judgment debtor filed a notice of intention to oppose (encl. 10) the said petition which I dismissed with costs on 3 September 1990 and at the same time handed out an Adjudicating and Receiving order against the judgment debtor. The present appeal is against my order of 3 September 1990.

Counsel for the judgment debtor argued that no act of bankruptcy had been committed even until the day of the present hearing of the notice to oppose the creditors petition. He had already filed his affidavit to set aside the bankruptcy notice under r. 95(1). The said application to set aside the bankruptcy notice had never been heard and as such no act of bankruptcy had been committed so the creditors petition was a nullity and must be set aside.

I do not agree with the contention of the Counsel of the judgment debtor that the creditors petition must be struck out on those grounds. Once he filed his affidavit with the view to set aside the bankruptcy notice under r. 95(1) of the Bankruptcy Rules 1969, the affidavit will be treated as an application to set aside the bankruptcy notice. Counsel for the judgment creditors argued that just because no date had been fixed by the Court to hear the application it did not mean that no act of bankruptcy had not been committed. The chronological events in this case following the filing of the bankruptcy notice by the judgment creditors on 3 January 1990 were as I have indicated above. The said bankruptcy notice was served on the judgment debtor on 22 January 1990. Four days later i.e., on 26 January, the judgment debtor filed his affidavit under r. 95(1) of the Bankruptcy Rules the effect of which was to operate as an application

to set aside the bankruptcy notice. Seven days after the service of the bankruptcy notice had passed, the judgment/debtor had not settled the judgment sum. So on 28 May 1990, more than 4 months after the service of the bankruptcy notice, the judgment creditors filed a creditors petition. For four months even after the filing of his affidavit (encl. 6) i.e., his application to set aside the bankruptcy notice, the judgment debtor had been keeping quiet. He had not made any attempt to settle his debt within the days as required under the bankruptcy notice except for the filing of his affidavit in encl. 6. Neither had he made any application to extend the seven-day period. Nor was it extended by the Senior Assistant Registrar. Then on 26 June 1990, the creditors' petition which was endorsed with the hearing date fixed for 3 September 1990 was served on the judgment debtor. Still he did nothing pertaining to the bankruptcy notice already served on him. Instead 9 days later i.e., on 5 July 1990, he filed his notice of intention to oppose the said creditors' petition. I agree that by 3 September 1990 i.e., the day of the hearing of the creditors' petition, it was too late for the judgment debtor to argue that his application to set aside the said bankruptcy notice had not been heard and that the creditors' petition was null and void *ab initio*. The bankruptcy notice stipulates that within 7 days after service of the notice, the judgment debtor is to settle the judgment debt. However r. 95(2) provides:

> If the application cannot be heard before the time specified in the notice for compliance with its requirements, the Registrar shall extend the time, and no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined.

The bankruptcy notice was served on the judgment debtor on 2 January 1990. If by 29 January 1990, the judgment debtor did not settle his debt, he would have committed an act of bankruptcy on that date. My understanding of r. 95(2) is that the application to set aside the bankruptcy notice must be heard within the time stipulated in that notice and in this case within 7 days after the service of the notice unless the seven-day period is extended. In the case before me, the seven day period was not extended. The reason for the failure to extend or for non-extension of the period is not material for consideration here. Because the seven-day period was not extended, therefore the "deeming" provision as provided in the second limb of r. 95(2) does not apply. In other words the consequence of "no act of bankruptcy shall be deemed to have been committed" did not arise in this case because the application to set aside the bankruptcy notice could be heard "before the time specified in the notice" meaning within the seven day period. Whether a date for the application to be heard within the seven day- period had been fixed and that no hearing took place is immaterial. Therefore the practical result was that r. 95 was not attracted notwithstanding the fact that the affidavit (encl. 6) had been filed by the judgment debtor. In the circumstances the validity of the creditors' petition (encl. 6) was not affected. So also was the validity of the bankruptcy notice. It remained untarnished. The judgment debtor had therefore committed an act of bankruptcy as there was no settlement of the judgment debt. Counsel for the judgment creditors cited the case of *Krishnamurthy s/o Nagaratnam v. Mayban*

Finance Bhd. [1990] 2 CLJ (Rep) 282. There is some difference in the facts between that case and the case before me. In *Krishnamurthy*, it was an application by the judgment debtor for an order to rescind and annul the receiving and adjudicating orders made against him. The hearing was on 10 March 1989. The bankruptcy notice was issued on 7 October 1987 and served on the judgment debtor 30 October 1987. Within 7 days of the service of the notice, the judgment debtor was to settle the judgment debt in the sum RM30,628.68. In other words the judgment debtor must pay on or before 6 November 1987. On 3 November 1987, the application to set aside the bankruptcy notice was filed. The hearing of the application was fixed by the Senior Assistant Registrar on 28 June 1988. There was no evidence that the judgment debtor had applied for extension of the seven-day period and neither was there evidence that the Senior Assistant Registrar had granted such extension. On 20 June 1988 when the application came up for hearing the case was transferred to another Court where a hearing date was fixed (7 October 1988) on which day the judgment debtor applied for postponement. When the matter came up again for hearing on 17 February 1989, he again applied for postponement. On 10 March 1989 the matter again came up for hearing and again he applied for postponement but the application to set aside the bankruptcy notice was not mentioned at all. Incidentally the same day had been fixed for the hearing of his application for an order to rescind and annul the receiving and adjudicating orders. In his judgment Dr. Zakaria J said:

> In the circumstances, it was too late for the applicant to raise the issue of the hearing of his application to set aside the bankruptcy notice at the hearing of the application to rescind and annul the receiving and adjudicating orders. See *Ex parte May* [1884] 12 QBD 497.

In this case, the Senior Assistant Registrar did fix the hearing date for the application to set aside the bankruptcy notice and it was fixed for the first time very much after the seven-day period and it was subsequently adjourned until the hearing of the other matter. Until then the judgment debtor never proceeded with his application to get aside the bankruptcy notice. In the case before me, subsequent to his filing his application to set aside the bankruptcy notice, he did nothing. No date for the hearing of the application within the seven-day period was fixed. He never even applied for a date for the hearing of his application nor did he apply for the extension of the seven-day period. Only on the hearing of the creditors' petition and his application to oppose the said petition that he broached the subject of his application to set aside the bankruptcy notice which I refused to entertain for the reasons I have earlier stated.

Further, the affidavit of the judgment debtor (encl. 6) otherwise his application to set aside the bankruptcy notice, states in paras. 3, 4 and 7 that he has a cross claim that is capable of being quantified and is genuine and is likely to succeed. The affidavit shows not one single figure or calculation in order to satisfy the Court as regards the quantum of the cross claim. Neither does the affidavit present any argument or ground in order to show that the cross claim has a reasonable chance of success. *Halsbury's Laws of England,* 4th Edn., Vol. 3:

Where the debtor has an appropriate counter claim, set-off or cross demand he must, within the time specified in the bankruptcy notice, file an affidavit to that effect with the Registrar of the Court which issued the notice.

The affidavit will be sufficient provided counterclaim, set-off or cross demand; (2) the counterclaim, set-off or cross demand is one which the debtor could not have set up in the action or other proceeding; (3) counterclaim, set-off or cross demand equals or exceeds the sum claimed in the notice. If the debtor fails on (3), he fails at the outset. But if a *prima facie* case is shown on (1) and (2) as well as on (3), the debtor will be given an opportunity to amplify his evidence in a supplementary affidavit containing detailed particulars of his case. The debtor must in general show that he has a genuine demand with a reasonable chance of success.

In the case of the *Sovereign General Insurance Sdn. Bhd. v. Koh Tian Bee* [1988] 1 CLJ (Rep) 277 at p. 280, Lee Hun Hoe CJ (Borneo) delivering the judgment of the Supreme Court also has this to say:

If the respondent was making a cross demand he must quantify it. He just could not come to Court and say his shares were worth considerably more. The burden of proof is on the respondent to show by the affidavit or affidavits three things which were stated clearly by Warner J, in *Re a debtor (No. 75N of 1982 Warrington), ex parte the debtor v. National Wesminster Bank* [1983] 3 All ER 545 at p. 553 as follows:

> ... First, the affidavit or affidavits must show that he has a cross-demand against the creditor which is genuine. To satisfy that requirement, the cross demand must be put forward in good faith and must have a reasonable probability of success, or, as it has also been expressed, must give rise to a triable issue. In the latter respect, there is no hard and fast rule as the degree of proof required. It depends in each case on the particular facts and circumstances of that case. Second, affidavit or affidavits must show that the cross-demand could not have been set up in the action in which the judgment relied on by the creditor was obtained. Third, the affidavit or affidavits must show that the cross-demand need not be for liquidated sum or even for a sum of money at all. But it must be capable of being quantified in terms of money and the affidavit or affidavits must quantify it.

In the case before me, as I have shown above, the affidavit (encl. 6), short and brief makes only a general statement to the effect that the judgment debtor has a cross claim which can be quantified. There is not the slightest indication as regards the amount or even the probability of success of the cross claim which it equal or exceeds the sum claimed in the notice. Also, no triable issue can be detected from the affidavit from which to assess the probability of success in the cross claim. With such a brief affidavit containing only general statements one may even begin to suspect whether there is in fact a cross claim. Thus I do not think I need to pursue any further in the examination of the circumstances of this case and suffice for me to say that for the above

reasons I dismissed the application of the judgment debtor to oppose the creditors' petition with costs. I also made a receiving and adjudicating orders against the judgment debtor as prayed.

Also found at [1992] 1 CLJ 709